

February 26, 2014

Jolie Houston
Los Altos City Attorney
Berliner Cohen
10 Almaden Blvd. 11th floor
San Jose, CA 95113

Re: Your Request for Advice
Our File No. A-14-207

Dear Ms. Houston:

This letter responds to your request for advice, on behalf of Los Altos City Councilmember Mary Prochnow, regarding her duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Our advice is limited to the conflict of interest provisions of the Act. This advice does not apply to other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

FACTS

The City of Los Altos is a general law city covering seven square miles on the lower portion of the San Francisco Peninsula. The City has a population of approximately 29,500, with a total number of households of 10,810, and a total number of businesses of roughly 1,332.

Councilmember Prochnow is a realtor and broker with Prochnow Realtors, Inc., located at 164 Main Street, Los Altos, with an 80-percent ownership interest in the corporation. Councilmember Prochnow has a 50-percent ownership interest in the building and property

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated. Note that conflict of interest regulations were extensively reorganized at the Commission’s February 19, 2015, Commission Meeting. Because this renumbering of the regulations has not yet been incorporated into the California Code of Regulations, citations to regulations in this letter still reflect the section number prior to the renumbering.

located at 164 Main Street. Like other real estate agents, she receives a commission income with Prochnow Realtors, Inc. Additionally, Councilmember Prochnow receives rental income from 13 tenants located in the building. While the majority of leases are month-to-month, some leases are for a longer term and extend up to three years. Tenants of the building use public parking located in Plaza 6. Plaza 6 is adjacent to the rear of the building. Councilmember Prochnow also owns a home just outside of the downtown area, but more than 500 feet from the area.

The City's downtown area is approximately one-tenth square mile and is served by ten City owned public parking plazas. Councilmember Prochnow's building is located in a Commercial Retail Sales zoning district. Under the City's Zoning Code, properties in certain zoning districts (including the Commercial Retail Sales district) that are adjacent to the parking plazas and participate in the City's public parking districts can use the parking plazas to meet the City's parking requirements. Councilmember Prochnow's building meets these requirements.

CONCLUSIONS AND ANALYSIS

Section 87100: Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Interests from which a conflict of interest may arise are defined in Section 87103. Those interests implicated by your account of the facts are the following:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more (Section 87103(b)) including a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10-percent interest or greater (Section 82033).
- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest (Section 82030(a)).
- An interest in the official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103.)

Prochnow Realtors/Rental Business: Councilmember Prochnow has interests in Prochnow Realtors and her Rental Business as business entities. Assuming Councilmember Prochnow's pro rata share of income from Prochnow Realtors and her Rental Business is \$500 or more in the 12 months prior to the decision, she also has an interests in the businesses as a sources of income. (Section 87103(a), (c) and (d).)

Clients of Prochnow Realtors: Councilmember Prochnow has an interest in any client of Prochnow Realtors if the councilmember's pro rata share of income derived from the customer aggregates to \$500 or more in the 12 months prior to the governmental decision. (Section 87103(c).)

Main Street Property: Councilmember Prochnow appears to have a real property interest in the Main Street Property. (Section 87103(b).)

Tenants: Councilmember Prochnow has an interest in any tenant of the Main Street Property as a source of income if her pro rata share of income from any tenant aggregates to \$500 or more in the 12 months prior to the decision. (Section 87103(c).)

You ask whether Councilmember Prochnow may take part in decisions regarding the following projects.

1. A commissioned parking study for all of the city's public parking plazas or a commissioned parking study to analyze a public parking structure that will include the financing of the structure through a combination of bonds, parcel taxes, private/public financing, or an in-lieu parking fee that would be adopted by a city ordinance.

Councilmember Prochnow may take part in a decision to commission a parking study (a) for all of the city's public parking plazas and (b) to analyze a parking structure. From the facts provided, none of Councilmember Prochnow's financial interests are explicitly involved in a decision to commission a parking study for all of the city's public parking plazas. Accordingly, an effect is reasonably foreseeable only if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical.

Assisting in making this determination, Regulation 18706(b) provides the following factors to consider:

“(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

“(2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

“(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.

“(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official’s economic interest could compromise the public official’s ability to act in a manner consistent with his or her duty to act in the best interests of the public.

“(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official’s economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.

“(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.”

In each case, we find that any effects of a decision to commission a parking study are purely hypothetical prior to the start of the study and that identifiable effects will be contingent on future decisions implementing the results of the study. Accordingly, we do not find the effects of either decision to be reasonably foreseeable.

We caution that Councilmember Prochnow may still be disqualified from future decision regarding the nature of the study or the implementation of the results from the study. For example, Councilmember Prochnow will likely be prohibited from taking part in any future decisions regarding the structure, including its financing, depending on the study’s findings, including the magnitude of any proposed structure and the proximity of any proposed locations to her Main Street Property.

2. A parking policy that will allow developers to re-stripe some or all of the parking plazas to accommodate more parking and facilitate the development of adjacent parcels.

In this case, Councilmember Prochnow operates Prochnow Realtors from her Main Street Property and leases additional space to thirteen separate tenants. Both Prochnow Realtors and the tenants utilize the parking plaza adjacent to the Main Street Property for their business needs. While additional parking may be a convenience to both Councilmember Prochnow and the tenants and may potentially increase business in the downtown area, it is unlikely that the mere re-striping of exiting parking plazas will have any financial effect on her interests. So long as there are no additional facts indicating a substantial increase in available parking, we do not find

it reasonably foreseeable that the decision regarding the re-striping of the existing parking plazas will have a material effect on any of Councilmember Prochnow's interest.

3. A Downtown Specific Plan that will focus on downtown re-development that may include parking as a part of the plan.

Pursuant to Regulation 18705.2(a)(1), the reasonably foreseeable financial effect of a governmental decision on a parcel of real property, in which an official has a financial interest, is material whenever the governmental decision involves the adoption of, or amendment to, a specific plan and the parcel is located within the proposed boundaries of the plan. Councilmember Prochnow's interest in the Main Street Property disqualifies her from making, participating in making, or using her position to influence any governmental decisions involving a downtown specific plan.

With respect to any part of a proposed decisions regarding a specific plan (such as parking), disqualification from the decisions regarding a specific plan includes disqualification from decisions involving any part of the plan unless the decisions can be segmented. Regulation 18709 provides the rules for segmenting a decision and provides in pertinent part:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Generally, whether or not any particular parking improvement or parking plan can be segmented from decisions regarding the specific plan will depend on the nature of the improvement or plan. For instance, as we have determined re-striping the existing plazas will not result in a reasonably foreseeable material financial effect, it would be permissible to segment a decision regarding the re-striping of the existing plazas from any related specific plan decisions. If Councilmember Prochnow needs additional assistance regarding the application of segmentation to any other particular improvement or parking plan, she should seek further advice and provide additional information on the nature of the proposed parking improvement or parking plan.

4. A zoning moratorium ordinance to prohibit any new development projects until after the Downtown Specific Plan has been adopted.

The Main Street Property is a commercial building containing Councilmember Prochnow's business as well as 13 additional tenants with terms ranging from month-to-month to up to three years. These facts indicate that it is unlikely that the Main Street Property, Prochnow Realtors, or the tenants of the Main Street Property will be significantly affected by the zoning moratorium. Therefore, barring additional facts, we do not find it reasonably foreseeable that the decision regarding the zoning moratorium will have a material effect on Councilmember Prochnow's interests in the Main Street Property or tenants of the building.²

However, we caution that Councilmember Prochnow also has financial interests in businesses and individuals that are a source of income to her as clients of Prochnow Realtors. To the extent that there are any facts indicating a financial effect on a client of Prochnow Realtors such as a client that has applied for rezoning or has undeveloped property in the downtown area, Councilmember Prochnow should seek additional advice identifying the client and the client's interest.

5. The appointment of an ad hoc committee to review recently completed buildings in the downtown area in the context of the current zoning regulations, the adopted Downtown Design Guidelines and Downtown Design Plan, and the results of the 2012 and 2014/15 downtown surveys, which may include recommendations to update the Downtown Design Plan.

As stated above, the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is material whenever the governmental decision involves the adoption of or amendment to a specific plan and the parcel is located within the proposed boundaries of the plan. (Regulation 18705.2(a)(1).) Because the committee will be tasked with reviewing recently completed buildings under the Downtown Design Plan and providing input regarding the adopted Downtown Design Plan, any decision

² A zoning moratorium ordinance prohibiting any new development projects until after the Downtown Specific Plan has been adopted generally maintains the status quo until a later time. Previously, we have determined that any financial effect of an interim ordinance prohibiting a change in land use pending the completion of a specific plan was not reasonably foreseeable absent extraordinary circumstances indicating that the official intends to change the use of his property. (*Barrow* Advice Letter, No. A-14-084(a).)

regarding the appointment of the committee involves the possible amendment to a specific plan. Therefore, Councilmember Prochnow may not make, participate in making, or use her position to influence the decision to appoint the committee.

6. Consideration of a new zoning provision requiring all commercial or office buildings to have story poles as part of the design review application process.

Regulation 18705.2(a)(2) states that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is material whenever the governmental decision “[d]etermines the parcel’s zoning or rezoning (other than a zoning decision applicable to all properties designated in that category). . . .” So long as the zoning decision is applicable to all commercial or office buildings, we find no reasonably foreseeable material financial effect on any of Councilmember Prochnow’s interests.

7. Any governmental decision where she, as a real estate agent/broker, has a property in escrow and the property is the subject of the decision or the property owner will be affected by the decision.

As the majority owner of Prochnow Realtors, with an 80-percent ownership interest, Councilmember Prochnow has a financial interest in any client of Prochnow Realtors if her pro rata share of income derived by Prochnow Realtors from the customer aggregates to \$500 in the 12 month period before the decision, as well as any person who receives a finder’s or other referral fee for referring a party to a transaction, or makes a referral under a contract with Prochnow Realtors. Income will include any income from a client of Prochnow Realtors once the funds have been placed into escrow, even if Prochnow Realtors has not yet received the funds. (Epstein Advice Letter, No. I-06-166.) To the extent that a decision will have a reasonably foreseeable material effect on any source of income, Councilmember Prochnow may not make, participate in making, or use her position to influence the decision. If there is any indication that a specific decision will effect a source of income to Councilmember Prochnow, the councilmember should seek additional advice identifying the decision and the source of income.

8. The purchase of license plate reader equipment and a possible amendment to parking enforcement hours.

While the purchase of a license plate reader and a possible amendment to parking enforcement hours in the downtown area may have some effects on customer traffic for businesses located within the area, so long as the amended parking enforcement hours apply uniformly to the entire downtown area, the potential effects on the interests within the area including Councilmember Prochnow’s interests are negligible. Thus, we do not find it reasonably foreseeable that the decision regarding the purchase of the license plate reader equipment will have a material effect on any of Councilmember Prochnow’s interests. Moreover, we do not find it reasonably foreseeable that an amendment to the parking enforcement hours will have a material effect on any of Councilmember Prochnow’s interests so long as the amended hours apply uniformly to the entire downtown area. To the extent that an amendment to parking

enforcement hours does not apply uniformly to the entire downtown area, Councilmember Prochnow should seek additional advice detailing the amendment and potential interests implicated by the decisions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John Wallace
Assistant General Counsel

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl